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ART. I. — *A System of Penal Law for the State of Louisiana, consisting of a Code of Crimes and Punishments, a Code of Procedure, a Code of Evidence, a Code of Reform and Prison Discipline, and a Book of Definitions; prepared under the Authority of a Law of the said State.* By EDWARD LIVINGSTON. *To which are prefixed a Preliminary Report on the Plan of a Penal Code, and Introductory Reports to the several Codes embraced in the System of Penal Law.* Published by James Kay, jun. & Brother. Philadelphia. 1833.

FEW have discharged more fully than Mr. Livingston that debt, which Bacon holds every one to owe to his profession. In addition to an honest and liberal practice, he has indeed, to use the language of that great man, visited and strengthened the roots and foundation of the science itself; he has graced it in reputation and dignity, and amplified it in profession and substance. It too generally happens, that those, who have confined themselves to a particular science, learn to attribute to it an undue importance among the various branches of human knowledge and improvement, and also bring themselves to believe, that in its forms, usages and long practised rules, there are intrinsic excellence and advantage, which it is unwise to controvert and almost improper to change. If we regret, we may yet pardon such prejudices to the votary of

abstract science, or to the professors of those arts whose objects are to excite the imagination or gratify the taste. The astronomer consumes the silent watches of the night in counting and noting the revolutions of worlds scarcely visible and immeasurably distant; why should we deny to him the pride of believing, that his pursuit is the purest and noblest that can engage the industry of our race? Such a belief quickens and rewards his own zeal, while it is innocent in every sense which can affect the interest or welfare of others. The artist or the mechanist, who limits his genius by the rules and theories of other days, is only left to find himself lingering in the race, and losing the profits or the honors which are gained by more enlightened competitors in the same pursuit. A prejudice, however, is only thus harmless, while it affects no one but him who has the right to indulge it, and may innocently do so. When it operates injuriously on the personal rights, the interests, property, or fortunes of mankind; when it excludes the lights which are shed on every kindred subject by philanthropy, research, and the certain progress of human knowledge; when it deals with things present, according to harsh, cold, or cruel doctrines of ages less wise and refined; when it upholds, as if they were sacred, forms and institutions that have sprung from obsolete customs, or arisen from the wants of a society altogether different; then prejudice ceases to be excusable, and those who uphold it ought to be regarded less as innocent advocates of the wisdom of other days, than as unwise and injudicious opposers of the improvement and happiness of their own times.

These principles are peculiarly applicable to jurisprudence; a science which directly affects all the social duties and relations of men. In preserving individual rights, it substitutes for the hand of power a universal mutual compact, whose foundation is the intention and desire of protecting all, at the least individual sacrifice. In preventing or punishing the excesses of passion and crime, it acts not from the impulse of personal retaliation, nor assumes a control over the secret emotions of the heart; but it calmly inquires into the exact extent of infringement on the privileges or happiness of others, and seeks so to punish it as to prevent the repetition of similar injuries, and bring home to the aggressor a full sense of the wrong that he has committed.

Such a science, therefore, is not abstract. It is immediately dependent on the state of human society. Its rules vary with the variations of knowledge, of refinement, of all the social arts. It improves in proportion to the improvements of civilization. Reason, and simplicity, and humanity remove its peculiarities, enlarge its utility, and soften its severity. It regards the present and not the past, equally in the things to be regulated and the manner in which they are treated ; and he, who, in our days, should govern himself in this science by the rules of Lycurgus or the Decemvirs, would not be more wise than a countryman of Arkwright or Laplace, who should calculate the motions of the stars like the astrologers of Chaldea, or weave our garments on such looms as were used by the fair-haired matrons of Troy.

Yet in no science has it been so difficult, as in this, to introduce these indisputable principles. In no science have its intelligent professors, those skilled in all its branches, and imbued with all its learning, united themselves so strenuously to maintain its actual excellence ; to oppose its progressive improvement, with the improvement of all things around ; and to reconcile us to the strange and obsolete forms, which are equally at variance with the reason, the customs, and the humanity of a later age. The despotic vigor of Justinian was requisite to reduce and to pare away the absurdities of centuries in the Roman law ; Napoleon found it scarcely more difficult to unite into one, half the principalities of Europe, than to reconcile the conflicts of the parliaments of France ; and even in Britain, amid all her wonderful progress in science and in art, men, prominent, intelligent and enlightened men, are still found, who vehemently uphold, in her civil and criminal laws, things equally absurd and inhumane ; who seem delighted to find reason in the most ridiculous fictions ; and who shake their heads now, with significant distrust, at the sagacity and philanthropy of Brougham, just as their predecessors may have done in former days at the innovations of Mansfield or of Bacon.

It could not have been without a full knowledge of all these difficulties, that Mr. Livingston undertook the task of framing a complete system of penal law for Louisiana, the State of his adoption. The opposition he had experienced to his efforts for introducing a simple and expeditious mode of civil practice, free alike from the prolixities of the Spanish and the

fictions of the English law, though it was fortunately unsuccessful, rested in his remembrance, and probably deferred, though it never induced him to forego, this more important and laborious undertaking. During fifteen years of almost uninterrupted residence in Louisiana, he had been engaged as a lawyer of the highest rank; he had become thoroughly conversant with every portion of the civil and criminal code; he had ascertained its intrinsic defects; and he had resolved, that, in fulfilling his duty to his profession, he would present to his fellow-citizens such views for the alteration and amendment of their criminal law, as were dictated by the benevolence of an enlightened age, and ought to be expected from a people possessing the fullest power of self-government.

In the early part of the year 1820, being at that time a member of the House of Representatives, he introduced to the notice of the legislature the subject of a complete revision of the criminal law. He stated, as the principles by which the legislature ought in his opinion to be governed, that the objects of a code were solely the prevention of crime, and reformation of the criminal; that all offences should be clearly defined, in language generally understood; that punishments should be proportioned to the offence; that the rules of evidence should be ascertained, as applicable to each; that the mode of procedure should be simple, and the duty of executive and magisterial officers explicitly declared by law. In all these points, the existing laws of Louisiana were notoriously defective; and the legislature readily yielded to such enlightened suggestions. An act was promptly passed, for the appointment of a person learned in the law, whose duty it should be to prepare and present to the succeeding assembly, for its consideration, a code of criminal law both in the French and English languages, clearly defining all offences, laying down the rules of evidence and procedure, pointing out the duties of public officers, and designating the nature and manner of punishment. To perform this high trust, Mr. Livingston was himself elected, by a joint vote of the Senate and House of Representatives; and, in accepting it, he at once resolved to encounter the necessary sacrifice of his private interest and professional engagements.

It is scarcely possible to imagine a more chaotic mass, than the existing provisions in Louisiana with regard to criminal offences. They were a strange compound of customs, stat-

utes, and traditions ; they were framed, as occasion had required, for the various stages of society, from uncertain and almost defenceless settlements in a savage wilderness, to the actual state of an enlightened and numerous commercial community ; and they blended the languages, opinions, and peculiarities of the successive sovereignties of the French, Spaniards, and Americans, in the same region. From the settlement of the country, at the close of the seventeenth century, until the year 1763, the institutions were of course founded on the existing laws of France. On its cession to Spain, that power solemnly promulgated its own laws, though of course many of the municipal regulations, which had previously existed, continued in force. When France in 1803 received back from Spain the possession of the province, by virtue of the treaty of St. Ildefonso, she retained it only provisionally, in order to deliver it to the United States, according to the treaty of Paris, and, during that short interval, made no material alteration in the existing laws. On the organization of the territorial government, while Congress extended to it certain general laws, gave the right of trial by jury, and introduced the writ of *habeas corpus*, they yet expressly retained all not directly inconsistent with these, and continued the existing code until altered by the legislature. Although, in the subsequent fifteen or twenty years, many such alterations undoubtedly took place, yet they were partial or temporary ; the old institutions were for the most part of actual authority ; and, in the course of his investigation, Mr. Livingston discovered, that the citizens of Louisiana, in the nineteenth century, were amenable for the most strange and ludicrous offences, and subject to such punishments as were inflicted in Europe during the middle ages. The inevitable result was, that the definition and prosecution of many crimes were not only uncertain, but placed entirely beyond the reach of the people ; a long list of penalties, equally oppressive and absurd, was, strictly speaking, in force, and might, in bad times, be made an instrument of great injustice ; a discretion, always unsafe and often trenching on legislative power, was of necessity yielded to the judiciary ; and there was an entire want of that precision of language and simplicity of arrangement, without which a penal code becomes little better than a system of legalized tyranny.

Such a state was unworthy of an enlightened, and dangerous to a free, people. The time had arrived, when it had

become impossible any longer to retain it, or to delay the remedy of evils becoming daily more apparent and more oppressive. Although the responsibility was great, Mr. Livingston at once perceived, that in executing the honorable duty he had undertaken, he could only satisfy those who had intrusted him with it, by boldly assuming a course entirely different from that of partial modification and temporary expediency. The nature and extent of the change were questions that demanded and received his deepest consideration. While he was determined, on the one hand, that no fear of innovation, or senseless clamor of prejudice, should induce him to throw away so rare an occasion for offering to his countrymen a system founded on the solid and permanent basis of public good, he had yet been too long and intimately engaged in the practice of the law, not to know the absolute necessity of attention to the most minute and careful practical provisions. A repeal of the old penal laws, and of such of the later statutes as cast any uncertainty on the construction of those that were retained, would have given but partial relief. To provide, by new statutes, for other cases, would have been only to continue the patchwork system which had produced the existing evils, and to bring back, in a few years, the same incongruities that had afforded the whole ground for amendment. A system of laws, uniform and consistent, either framed into codes, or embraced in different statutes, was the only remedy that could satisfy the people of Louisiana.

Though well aware of the objections that had often been started to a written code, the reflections and experience of Mr. Livingston both led him to prefer it to a system of different and independent laws. The State, after a practice of many years, had derived such indisputable benefit from a similar improvement in the civil branch of its jurisprudence, where the endless variety and ever-changing nature of contracts and other civil relations presented peculiar difficulties, that it was impossible to feel the force of objections raised to the easier task of making a written system of penal law. As to its superiority, if capable of practical and efficient operation, there could be no doubt. It is finely remarked by Blackstone, in speaking of criminal law, that "the knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it its

adequate and necessary penalty, is of the utmost importance to every individual in the state; for no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not, at some time or other, be deeply interested in these researches. The infirmities of the best among us," he continues, "the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us, upon a moment's reflection, that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern." That this knowledge is to be more easily obtained by every citizen, and more generally and extensively diffused, by means of a simple arrangement of the penal law, under its different heads and in a single and complete system, seems scarcely to need assertion. The legislator then discovers, at a glance, what ought to be supplied, retracted, or corrected; the magistrate and the judge see at once their duties, and the extent and limitation of their powers; the citizen knows, without the necessity of extraordinary scrutiny, the rights of himself and others, by what acts those are to be maintained, and these will be violated.

The labors of Mr. Livingston were, therefore, guided by two paramount considerations. He endeavoured to ascertain accurately and completely the offences which were to be guarded against and suppressed, for the welfare of the whole community, without a reference to existing laws or prejudices, except so far as they affected that welfare; and he undertook to prepare, to the fullest extent of his abilities, a written system, expressing in plain language all the rules necessary for protecting the government of the country, and the persons, property, and reputations of the citizens, and for preventing and punishing wilful and careless breaches of these rules, when truly ascertained. At the session of the legislature, in the early part of the year 1822, he presented the first result of his labors, in a preliminary report to the General Assembly, stating the progress he had made, explaining the plan on which he proposed to execute the work, giving some detached parts as specimens of the execution, and awaiting their direction, whether it should be completed or not. The

General Assembly was so entirely satisfied with the correctness of the principles laid down by Mr. Livingston, and the able manner in which they were developed, that a joint resolution was passed by the Senate and House of Representatives, and afterwards approved by the Governor, in which they declared their entire approbation of the plan proposed, and earnestly solicited him to prosecute his work in accordance with it.

Thus cheered and encouraged, in the very outset, by the approval of those who had first selected him, he proceeded with alacrity in the execution of his task. The exercise of his best faculties, to use his own language, had been laboriously and faithfully employed, under the direction of a religious desire to perform the high duty intrusted to him, in a manner which might realize, in some degree, the great views at which he aimed. Not a provision was made without the deepest reflection upon its consequences. Not a line was written, that was not sent to every quarter of the Union in search of amendment. Every suggestion offered was adopted without pride of opinion, when it brought conviction to his mind.

"Well aware," he says, "of the difficulties of my task, but feeling convinced that they were not insurmountable, I undertook it with so much confidence as was necessary to sustain me in its execution; but with that distrust of my own powers, which made me submit to the test of long reflection and severe scrutiny, every principle I laid down, and every provision intended to give it effect. I made these my leading rules; to adopt no theory, by whatever specious argument supported, until I should be convinced of its practical utility; diligently to seek for information, but to admit nothing upon the mere authority of high names; to make no unnecessary innovation, but boldly to propose every change I should think practicable and useful."

This process, of course, unavoidably consumed much time; but, by assiduous labor, in little more than two years after his plan had received the sanction of the legislature, by the resolution referred to, he completed the entire work. It was at this period, that he was interrupted by one of those accidents, which sometimes occur to destroy the best monuments of human industry, and suddenly and unexpectedly mar the most useful and promising undertakings. Fortunately, in this instance, his patience and zeal enabled him to prevent that probable result. In the autumn of 1824, he had finished his manuscript, and prepared it completely for submission to the

legislature. Having received authority from them to print it for that purpose, he caused a fair copy of the whole to be written. So anxious was he to avoid error, that he passed a great part of the night previous to sending it to the press, in himself comparing this with the original draft. He went to bed at a late hour, leaving both the manuscripts together in his library, and consoling himself with the pleasing thought, that he had completed the laborious task which had engaged his time and constant reflections. Not long afterwards he was awakened by a cry of fire. This was found to be in the room where his papers had been left. They were all consumed. Not a note or memorandum was saved. Though stunned at first by the sudden misfortune, his equanimity and industry did not desert him. Before the close of the same day, he had quietly commenced his task anew. On the meeting of the legislature, he communicated the incident to them, and another year was granted him to repair it. This was to be done entirely from recollection, as not a written vestige remained; and the labor of recomposition, always irksome, was interrupted and rendered more difficult by the interference of engagements which he had made on the supposition that this was done. In two years more, the second edition of his work was finished, and, in 1826, he presented his complete "System of Penal Law," to the Legislature of Louisiana, in the shape, more perfect than it originally was, in which we now see it.

Prefixed to the system itself, and forming, perhaps, to many persons, the most interesting portion of the work, is a series of introductory reports on each of its principal divisions. In these, Mr. Livingston has delineated, with a masterly hand, an outline of the whole science of penal jurisprudence. Pointing out, with the sagacity of a practised lawyer and the spirit of an intelligent legislator, the ends to be attained and the existing errors, he has discussed, with profound skill, the proper remedies to be applied. He clearly explains his own views; enters most minutely and carefully into them all; and submits, with the utmost candor, and, it must be admitted, always with much strength of argument and reflection, and generally with great correctness, his own original and peculiar suggestions. No one can fail to be impressed especially with the enlightened spirit of philanthropy, the single aim to benefit his fellow-creatures, which breathes throughout these discus-

sions; and to this it may be added, that there is always an unaffected beauty and simplicity in the language, frequently rising, when the topic demands it, to a fervent eloquence, which will command the attention and interest of those, who might be repelled by the gravity and want of imagination, with which such subjects are generally treated. Indeed, the plan of presenting these preliminary arguments is a happy one. The design of the legislature was dictated by considerations of a just and beneficent patriotism. They desired to obtain for their constituents the best mode of administering justice, which could be derived from the experience, sagacity, and benevolence of the age. Though selecting a single individual to present this, it was with no weak or inconsiderate reverence for his opinions; but in a belief, that, from his studies and character, he could offer them a system which must possess more than usual excellence. Whether or not it did so, they were afterwards to judge. The wisdom of abolishing that which existed, the superiority of what might be substituted, the additions proposed to supply deficiencies, — all these were to be solemnly passed upon by them in completing the task, which they had only commenced, in confiding to Mr. Livingston his honorable trust. It was in accordance with this spirit, that, when he submitted his system, he also submitted, with the utmost frankness and fulness, all his reasons in support of it. Addressing the General Assembly, he modestly says;

"They are longer and more argumentative than would have been necessary, if, still a member of your honorable body, I could meet objections as they were raised, and make the corrections which your superior wisdom would suggest. Having offered nothing without reflection, I have reasons for all I have proposed. Many of them, probably, will be found insufficient to support my conclusions; but those conclusions are honestly if not wisely drawn, and the system which they support is submitted in the full confidence, that it will receive a fair, a full, and a deliberate consideration. Fair, without prejudice against the reporter for the opinions he may entertain on other subjects, or against his doctrines for their novelty; full, after a consideration of the whole system and the bearing of its different parts on each other; deliberate, without rejecting any one provision, until the reasons for proposing it have been maturely weighed, and its probable effects calculated. A decision thus made must be wise, and will doubtless prove satisfactory to your constituents, and honorable to your country and yourselves."

The "System of Penal Law" opens with a Preliminary Title, briefly stating the fundamental objects for the attainment of which it is established, and the plan and divisions in which it is framed.

The original design of Mr. Livingston was, to comprise the whole system in a single code, giving a separate book to each of the principal divisions. A little experience, however, showed him, that, by such an arrangement, the subdivisions would not be sufficiently numerous to preserve order and distinctness in the distribution; and that, by forming separate codes, these would be secured, and an easier mode of reference obtained. This plan and division, therefore, were finally adopted.

The System comprises four distinct codes and a book of definitions.

The first is called the *Code of Crimes and Punishments.* It is divided into two books. It contains general principles, and the description of all acts or omissions that are declared to be offences, with the punishment assigned to each.

The second is called the *Code of Criminal Procedure.* It is divided into three books. It contains the means provided for preventing offences that are apprehended, and repressing those that exist; it directs the mode of bringing offenders to justice; and it describes the forms to be used in judicial proceedings.

The third is called the *Code of Evidence.* It is divided into two books. It contains the nature and whole law of evidence in penal as well as civil cases; and it lays down the rules applicable to the several kinds of evidence.

The fourth is called the *Code of Reform and Prison Discipline.* It is divided into three books. It contains a system of prison discipline, in all the stages in which imprisonment is used, either as the means of detention or punishment; the places of confinement; the treatment of prisoners therein; and the proper provisions for the voluntary and compulsory labor of discharged convicts and irreclaimable vagrants.

The concluding division of the System is a *Book of Definitions*, which defines the technical words and phrases used in the several codes.

I. The *Code of Crimes and Punishments* is of course the most interesting portion of the work. It is that in which Mr.

Livingston displays his adherence to, and interpretation of the principles of jurisprudence, previously laid down, as the basis of his system; that, by which the soundness and practicableness of these is to be effectually tested. It is a different, perhaps an easier task, to reason on the general principles of science, to point out incontrovertibly what justice, philanthropy, and knowledge require, than to frame laws imbued with the spirit of these, which shall also meet the exigencies of human society, and prevent or repair the injuries arising from depravity or crime. To show what is right and fit, is the delightful aim of philosophy; to reduce it and apply it to practice, is the studious labor of legislation.

The first book of this code contains general provisions, relative to the operations of the laws, to prosecutions and trials, and to the circumstances under which acts, that would otherwise be offences, may be justified or excused. These provisions embrace, in brief and simple language, what is necessary to protect the criminal from injustice, while they sustain the administration of the laws. In most instances they do not differ from those which belong to the enlightened jurisprudence of modern times; but, in some, Mr. Livingston has made changes too important not to be noticed.

Offences are explicitly confined to such acts or omissions as are made the direct subject of legislative decision; and no pretence of their being within its meaning or spirit, no vague reference to the laws of nature, religion, or morality, is permitted to sanction the notice or punishment of them. The necessity of this provision has been proved by the frequent practice of American courts. Deriving their jurisprudence chiefly from the unwritten code of England, many instances are not wanting of the introduction of constructive crimes, which are utterly at variance with institutions, where interference in the different departments of government is forbidden. No injurious consequences, arising from an unpunished offence, accidentally unprovided for, can equal those which have resulted, and must inevitably result, from judicial legislation.

Another provision, novel in its character, which is introduced by Mr. Livingston, is that which simplifies the law, and ascertains the comparative degrees of guilt, where crimes are committed by several persons. To assimilate a person actually ignorant of a crime with the perpetrator, because accident

or the bonds of kindred may have made him acquainted with, and induced him to conceal it, seems to be equally harsh and unjust. To relieve a supplicant offender who relies on our generosity, is an act which humanity can scarcely condemn, even in a stranger. To make obedience to the law consist in sacrificing the ties of nature, in betraying those nearest and dearest to us by affection and by blood, can only be the rule of a barbarous and distant age. "Almighty power," Mr. Livingston eloquently remarks, "might counteract, for its own purposes, the feelings of humanity; but a mortal legislator should not presume to do it. In modern times, such laws are too repugnant to our feelings to be frequently executed; but that they may never be enforced, they should be expunged from every code which they disgrace." To put an end, therefore, to this conflict between natural sensibility and harsh legislation, Mr. Livingston provides that no relative of the principal offender, in the ascending or descending line, or in the collateral as far as the first degree, no person united to him by marriage, or owing obedience to him as a servant, shall be punished as an accessory. He thinks, however, that cases involving other ties of gratitude or friendship cannot be so properly distinguished by law, and he leaves them for the consideration of the pardoning power.

The second book of this code is the most important in the whole System. It enumerates, classes, and defines all offences, as well as prescribes the nature and extent of punishments. The former naturally divide themselves, for the purpose of arrangement, into two great classes of public or private injuries, according to the character of the object against which they are directed. The latter are founded on the principle, that loss of personal liberty, of property, and of social and political privilege, are the best modes of suppression, prevention, and reform.

Under the head of public offences, are ranked those which affect the sovereignty of the State, in its legislative, executive, or judiciary power; the public tranquillity; the revenue; the right of suffrage; the public records; the current coin; the internal and external commerce; the freedom of the press; the public health; the public property and highways; the morals of the people; and the exercise of religion. Each of the offences falling under these heads is accurately defined, and provisions, intended to meet every case, have been intro-

duced, with an industry that has left little, if any thing, unnoticed. In regard to some of them, there is considerable novelty.

In offences against the legislative power, all interference by violence, threats, or corruption is forbidden under appropriate penalties, instead of being left to be repressed by the supposed inherent right to punish contempts.

In those against the judiciary, while such as are of more usual occurrence are guarded against, those which may be committed by the functionaries themselves are specially considered. Combating, with firmness, but without disrespect, the strongly urged sentiments of those who think it degrading to suppose that men entrusted with this high office can be influenced by such inducements as would bias others, Mr. Livingston has applied, in this instance, the same strict principles of positive legislation, as in every other.

"I acknowledge," he remarks, "the force of the maxim, that confidence in generous minds begets a disposition to merit it; but I deny the propriety of its general application. The penalties of law are founded on the supposition, that, without them, its precepts would not be fulfilled. Could we count on that generous disposition which the objection supposes, there would be no need of any sanction to our laws. The legislator need only point out his will and express his confidence in the integrity of those to whom it was directed, and the work of legislation would be done. But the argument is not pressed so far. It is acknowledged that penalties are necessary to insure obedience in ordinary cases; but it is said, that judges form an honorable exception. Restrain all the rest of the world by the fear of punishment; trust to the integrity of the judge for the performance of his duty. What, will you impose no restraint? no impeachment for corruption? no indictment for bribery? Yes, these we will allow; but he must not be restrained from accepting presents as the testimonials of friendship, which are no more than common courtesies of life. Now if you can think it necessary to guard against the gross corruption of direct bribery, why will you permit a practice which is the most common mode of effecting it? Not to speak of their being made the vehicle for the more glaring crimes, their favorable effect on the mind of man is evident to any one who has the slightest knowledge of the world. Received as tokens of kindness at first, their slight value excites no suspicion; they are multiplied; their value is increased, and the obligation goes on augmenting until it can only

be discharged by a favorable decree. But the practice ought to be forbidden, if it should have no other effect than that of exciting suspicion. If the judge has been in the habit of receiving presents of game or liquors from a suitor who gains his cause, the loser will not fail to attribute it to the flavor of the venison or the exquisite taste of the wine. Nor is the inhibition either new, or considered as derogatory to officers of the highest trust. It is a constitutional provision, that no one, holding an office of trust or profit under the United States, shall accept *any presents* from a foreign power. If this does not degrade the ambassador, why should a similar one degrade the judge? Besides, be consistent. You have two sets of judges. If those who determine the fact, when they are exhausted with hunger and fatigue, receive the slightest refreshment from one of the parties, you dishonor them by setting aside their verdict, as being corruptly procured, and often punish them for misconduct; and yet you think it degrading to the other class of judges, to prevent them receiving gifts of much greater value."

So in regard to the punishment for contempts; a power subject to be exercised by courts, in a manner and to an extent, utterly at variance with the principles, conceded in every other instance to be just. This indefinite offence, and this dangerous power, are reduced to that certainty and limit which are prescribed in respect to other crimes. Ample means of repression are vested in the court; they may remove every actual interruption of their proceedings; they may enforce prompt obedience to their orders; they may, if simple removal is not sufficient, restrain by imprisonment. But here, their extraordinary interference stops; the interruption being at an end, the trial and punishment must follow in the regular mode. The judge is not made an accuser, nor the accuser a judge; the dignity of the court is not lessened by angry altercation; above all, the chosen ministers of the law are not specially allowed to violate its most sacred forms.

Among offences against morals, Mr. Livingston has embraced and punished insulting and indecent language to women, deliberate seduction, and the infamous agency of ministering to the vices of others; all of them basely profligate, though our codes, following in the track of the English law, have omitted or inadequately guarded against them. In the same spirit, he has denounced a proper penalty against violating the sanctuary of the tomb; a provision in accordance with the natural sentiments of men in every country and age.

"The catacomb, the grave, and the urn," he truly and eloquently says, "have been held equally sacred; and any intrusion upon them has always not only been considered as immoral, but punished as a crime. It is in vain that pretended philosophy affects to consider it a prejudice. The feelings of the philosopher belie the language of his wisdom; and, however indifferent he might feel as to his own remains, he would not see, without affliction, the body of a friend or relation torn from the grave, even to promote the progress of science. It is in vain that we are told, and are truly told, that the health and life of the living ought not to be sacrificed to a vain respect for the body of the dead, incapable of suffering here, or feeling the ignominy of exposure; the reason may be convinced, but the feeling remains. Science must be content with subjects, whose dissection will interest the feelings of none who are alive. The bodies of those few who, themselves above this prejudice, devote their remains to the cause of science; those of malefactors who die in the imprisonment inflicted by the law, must suffice for the improvement of surgical knowledge. But the laws must protect, in the place of their lasting rest, the remains that are sacred to the memory of surviving relations or friends. This natural feeling has not been neglected in the code which is presented, and a proper punishment is denounced against every violation of the sanctuary of the tomb."

Under the head of private offences, are ranked those which affect individuals, and injure them in their reputation, their persons, their political privileges, their civil rights, their professions, and their property. From among them is wisely and humanely excluded, suicide; the sad act of misfortune or despair, which most criminal codes have chosen to treat as a crime of the deepest dye. It seems, indeed, a peculiarly strange dictate of law, to pursue with penal sanctions the inanimate body, which has ceased to feel either ignominy or pain. But it becomes still more so, when, by so doing, we inflict exclusively upon the innocent all the consequences. To prevent or to remedy, even to punish it, is beyond our power; we can only harrow the feelings, and seize on the fortunes, of those who have been made already to suffer from the sensibilities of human nature, and, with impotent revenge, strike the guiltless because the guilty has placed himself beyond our reach. The justice, therefore, as well as the propriety of omitting this, in the enumeration of crimes, seems indisputable.

In treating of offences, which affect individual reputation, Mr. Livingston has examined, with extreme care, the whole subject of libel and slander. This has always proved peculiarly difficult, where free institutions exist, since the instrument usually employed in the work of detraction, is also one necessary to spread information, promote science, support political and civil liberty, and disseminate the truths of religion. To permit its unrestrained employment for these noble ends, and yet to prevent its use for the destruction of individual reputation and happiness, is a task worthy, from its importance, of the most zealous studies of a beneficent and patriotic legislator. In the code of Louisiana, the indefinite and absurd offence of libelling incorporeal beings (if we may use the phrase) is totally abolished ; men are to be protected, not governments, courts, or corporations ; private character is to be guarded, not public measures. These, which are for the benefit of all, must be guarded by the approving support of all ; they must be strong enough, in the language of Cromwell, "to stand against paper-shot," or they are not worth guarding ; and while to discuss them in the widest possible range must be a trifling evil, to impose the least restraint on their examination would be one of incalculable amount. In regard to individual character, however, every man is equally protected from defamation, every man has a right to appeal to the laws ; and upon the same principle, whether he is thus injured while executing a public trust, or pursuing his private business. That principle, as admirably laid down by Mr. Livingston, is, to punish an act wilfully done, which injures the character of a fellow-citizen, without any motive of private good or public duty. This reaches the great object in the law of libel, without violating any rule of justice or general utility ; it meets the cases, in which the truth of the statement may or may not be a justification ; it permits the exposure of that which is proper to be made known, but not of what, without any corresponding benefit, would tend only to produce injury, ridicule, or misery.

In the important title of offences against the person (a class of crimes which it is, perhaps, the first object of civilized society to prevent), each of the various kinds of injury, from a simple assault to homicide attended with every circumstance of aggravation, is defined with extreme care, and with an anxious desire properly to measure the degrees of guilt.

In the sections relating to justifiable homicide, the rules are clearly laid down, that authorize the execution of the orders of magistrates or courts, and the defence of person and property to the last extremity. In no branch of criminal law are such rules more needed for the information and protection of a citizen. His first duties to his country and to himself are those of aid to the public officer and resistance to private aggression. Properly to perform these, is not only legal, but praiseworthy; to do so improperly, constitutes an offence, which brings down the severest penalty of the law. The same act in one way is a duty, in another a crime. It is, therefore, a cruel defect in legislation, to leave in the slightest degree obscure, as has been too generally the case, the rules that justify homicide, either in the execution of a public law, or the defence of a private right. Excusable homicide is made to differ from this, in being involuntary, and unavoidable by common prudence or care. Culpable homicide embraces those acts which can neither be justified nor excused, and which, beginning at the lowest degree where negligence alone, without any criminal intention, is to be attributed to the perpetrator, rises to murder in its appalling forms of assassination and parricide. Those who are satisfied with the provisions derived from the common law of England, which knows only the two classes of manslaughter and murder, will, perhaps, be startled at eight degrees of guilt, graduated according to the intention and manner of the crime. Yet, certainly, to confound together a sacrifice of life caused by negligence and by design; by extreme provocation and with the want of any; by open attack, and by secret assassination, poison, or lying in wait; by avowed hostility and by a breach of those holy relations which imply confidence, fidelity, or protection; is a defect of jurisprudence in respect as well to the designation of crimes, as to the just assignment of punishment.

The class of offences, which forms the concluding chapter of this code, embraces the numerous catalogue of those affecting property. They are arranged and defined with much care, whether arising from a malicious intention to destroy, or a fraudulent design to appropriate property that does not belong to the offender.

The means by which Mr. Livingston proposes to secure obedience to the provisions he has thus made; to prevent or to punish the offences he has thus elaborately arranged and

defined; are limited, as we have already observed, to the deprivation of personal liberty, property, and social and political privileges.

He discards the disgusting, cruel, and inefficient modes of punishment, which, under greater or less modifications, have continued, until a very recent period, to disgrace the jurisprudence of countries pretending to the greatest refinement, and continue at present to be approved, and even applauded, in that of the largest number of the nations of the world. He proposes to abolish at once, and in every instance, all punishments that spring from a desire to gratify revenge, or to inflict on the offenders inhuman suffering. He stops not with the prohibition of the faggot or the rack, because these are universally denounced by modern justice or humanity; but he equally prohibits punishments of the same character, that are yet retained, and which a similar spirit of justice and humanity ought equally to condemn. Banishment, imprisonment in chains, exposure to public derision, mutilation, and stripes, are all still inflicted by the codes of enlightened nations, but are all a violation of the same principles, which prohibit, in penal sanctions, injustice, cruelty, and revenge. Banishment forces upon another country him who has violated the laws of his own, in defiance of the common rights of nations; it leaves the criminal at liberty to repeat his crime, where his character and habits are unknown; it holds out no means of reformation; and it offers no salutary example to deter others from the commission of a similar offence. Imprisonment in chains is at once cruel and unequal; it is always a torture to the weak, and may be so to the strong, according to the discretion and petty despotism of his jailer; it preys upon the spirit by the infliction of bodily pain; it obliges to constant and debasing indolence. Exposure to public derision is a mode of punishment, whose absolute inefficacy has been established by its increased disuse; it can produce no reform in the offender; it serves, on the contrary, to harden him in crimes; it offers no useful example to those who behold it, for it appeals only to the lowest passions, and if it creates any other sensation, it is that of sympathy. Mutilation is almost repudiated from the code of modern nations; it inflicts indelible marks of disgrace, which drive the wretched victim into the constant repetition of his crimes; it has no real motive but revenge, for its sole consequence is bodily suffering; it destroys the hope of reformation, and exhibits to society

a picture that excites either its sympathy or disgust. Stripes are liable to almost every objection, that can be made to public exposure and mutilation; they are founded on the propriety of inflicting pain; they are cruel and revengeful punishments; they produce public and lasting shame; they bring no repentance; convince the criminal of no error; but restore him to his associates at once exasperated and disgraced.

Mr. Livingston regards capital punishment as liable to some of the same objections with the rest which he has discarded, as well as to others peculiar to itself. While we cannot profess to be converts to his system on this very important subject, it is impossible not to admire the beauty and force of thought and language, as well as the philanthropic spirit, with which it is maintained. At the same time, whatever of substantial novelty there is in Mr. Livingston's statement of the argument, will be found, we think, to consist rather in the omission of topics, to which a prominence has been given by others, than in the contribution of any new ground of reasoning; so that we may be the more readily excused for not following his discussion at any length. He does not urge, as has commonly been done, the absolute sacredness of human life. He admits, that, while individuals and society have the right to preserve their existence, and are under an obligation to defend it, when attacked, the life of an assailant may be taken, if one or the other is threatened with destruction, and no alternative remains to prevent it. This right of self-defence, however, allowed to exist between nations during war, and between a nation and a portion of its citizens at the moment of insurrection, he denies to be justly claimed on the part of a community against its individual members, before the crisis requiring self-defence has arrived, or after it has passed. He insists, that capital execution accomplishes neither of the legitimate ends of punishment; neither the reformation of the criminal, nor the prevention of crime; and he refers to the experience of English criminal jurisprudence to show the insensibility of convicts under sentence of death. He denounces the practice, on the ground of alleged ill effects on the moral character and sensibilities of those by whom it is witnessed; and he urges, with most impressive force, the irrevocable nature of such a doom, making it impossible, by any subsequent act, to repair the wrong which may have been sustained from the perfidy of accusers, the adverse bearing of

unfortunately concurring circumstances, or the infirmity of judges.

Part of this argument presents issues of fact, capable, of course, of being settled on sufficient evidence ; and when it shall be manifest, from a sufficiently large induction of ascertained cases, what is the state of mind of convicts under capital sentence, of prisoners liable to it, of the crowds which witness it, and of the communities whose attention is drawn to it, the question will be materially disembarrassed. In the mean time, we cannot consent to take instances of apparent insensibility on the part of convicts, as clearly indicating the absence of severe internal struggles ; nor could we receive a few perfectly well authenticated instances of this sort, as proofs of a prevailing state of mind ; nor should we consider examples of an utter recklessness, after sentence was passed, as showing (what alone is of much consequence), that while it was in prospect, and the act that was to incur it was under contemplation, it had not been apprehended with extreme alarm ; nor do we find reason to regard the assembling of crowds at an execution, as evincing any thing so much as the singularly exciting horror of the scene ; nor can we confidently take the effect, good or bad, produced upon those crowds, for the effect upon that much larger part of a population, which does not mingle in them ; nor can we, in any way, escape from the idea, that the dread of a dishonorable death is, after all, the sanction of the most universal and absolute efficacy, of all within human appointment. We are not convinced by the view which limits the community's rights of self-defence to the moment of aggression ; which only allows it to guard, by extreme methods, against violence, *flagrante delicto*. The community wants not so much protection against the individual criminal, as against crime. This is the foundation of exemplary punishment ; and this most essential claim of self-defence remains untouched by the argument, even when it should be allowed, that capital punishment, a community's most perfect security against a citizen whose past misconduct shows that it is in extreme danger from him, is a security which it can afford to dispense with, in favor of some other less severe. We are much more moved, — we never fail to be strongly moved, — by the argument on the irrevocable character of a visitation, which, through human frailty, may be made, has been made, to fall upon the innocent. We never look at it without being

prompted anew to an anxious inquiry, whether the security of men in social life is not capable of being adequately provided for, without the administration of an irremissible penalty, subject, by possibility, to such abuse; and, when we find ourselves driven from this ground, we are still pursued by the problem, whether it would not be better for innocent men to relinquish some, or even much, of their security, than that such a horror should, in any instance, be permitted to befall. Mr. Livingston has argued this part of the question with a pathetic eloquence, which there is no resisting while one reads; and he refers to one instance of enormous wrong, as occurring within his own practice, which no one can wonder should have materially influenced his feelings on the subject. His views, both for the source whence they proceed, and the generous earnestness with which they are enforced, are entitled to the most attentive consideration. Much as we fear, that (at least till popular education has far more fully done its work) capital punishment will remain an awful necessity of social existence, we feel indebted to whoever helps to secure to the question a calm and thorough scrutiny; and most earnestly do we desire, that neither haste nor bigotry on the one hand, nor a weak and timid sensibility on the other, but a calm and comprehensive wisdom, and the most compassionate and delicate sense of human infirmities and human rights, may dictate the decision.

Mr. Livingston thus confines the punishments, prescribed in his system, to the deprivation of personal liberty, property, and social and political privileges. Fines, disfranchisement, and imprisonment, are those only that he proposes to inflict; but these he varies and graduates according to the nature of the crime, and the circumstances that extenuate or aggravate it. Pecuniary fines; degradation from office; temporary suspension of civil rights; permanent deprivation of civil rights; simple imprisonment; imprisonment at hard labor; and solitary confinement during certain intervals of the time of imprisonment, to be determined in the sentence, — such is the scale adopted in this code. He contends that this is sufficient to produce the just ends of punishment, and has, in itself, peculiar and indisputable advantages; that it affords a prospect of reformation in the criminal, highly probable; that it restrains him effectually from the repetition of his crime; that it offers a permanent and striking example to deter others; and that it is so mild, that it can

enlist no prejudice against its execution and in favor of the sufferer, either among those called upon to try and condemn him, or those whose duty it may be to carry the sentence into effect. He submits, that its sufficiency is secured by the advantage it has of being divisible almost to infinity; that there is no offence, however slight, to meet which it may not be moderated; none so atrocious, that, by the accumulation of its various degrees, an adequate punishment may not be found; that it may be made, also, to suit the differences of sex, age, habits, and constitution, which in themselves cause and constitute so different an amount of actual suffering to the criminal, where the nominal penalty is the same. So far as regards imprisonment, either in its simple or more severe character, this scale of punishment looks to the penitentiary system for its complete developement and perfect execution; it therefore improves in efficiency as well as humanity, with all the improvements of that admirable mode of punishment.

II. The *Code of Criminal Procedure* naturally succeeds that designating the acts that are a violation of the law; for it points out the mode, in which they are to be prevented or repressed, and in which they are to be ascertained, with the precision justice requires, if they have been actually committed. It is not enough, that every citizen should know what actions he ought to avoid as crimes; he should also know what means he has of preventing or punishing such as injure him, and also of defending himself, when unjustly charged with the commission of such as injure others.

This code is divided into three books. The first contains the means of preventing offences, and of putting an end to such as continue; designating particularly the cases where military force may be employed in aid of the civil power, and prescribing the rules by which it is to be governed in that service. The second directs the mode of bringing an offender to punishment; and the last gives the forms that are to be used, in all judicial proceedings, to attain these ends. An introductory title states conspicuously and explicitly the objects of the code; security to the innocent, not only from the danger of an unjust conviction, but the apprehension of it; the prevention of intended offences, by pointing out when and how an individual may require the aid of a magistrate and his fellow-citizens, or use his own physical powers, to resist

aggression; the destruction of all hope of escape from merited punishment by resort to technical and formal objections, — a species of false clemency, which can arise only from the impropriety or severity of the law in its spirit and provisions, and which violates every principle, as it destroys every benefit, it was meant to secure; economy and despatch, objects equally desirable for the prosecution of justice on one hand, and the defence of private rights on the other, since the want of them at once increases the difficulty of conviction, and lessens the force of beneficial example where there is guilt, while it inflicts unmerited punishment on the innocent; the abolition of all vexatious proceedings; and the establishment of simplicity in forms, an end society has a right to demand, since the obligations and restraints imposed by the most perfect laws are necessarily attended with an inconvenience, that ought to be reduced to the lowest degree consistent with public safety. In pointing out these distinctly, as the objects of a code of procedure, Mr. Livingston remarks, that it is done, that future legislatures may weigh their importance, examine how far practice shall prove the different provisions to be in conformity with them, observe in what points deviations come to be made, and introduce, if requisite, such amendments as will retain them in full effect.

The first book contains the provisions of the code for preventing offences. Among them is one, for the most part, if not altogether, novel; bestowing honorary and pecuniary rewards on him who brings an offender to justice.

"If any one shall voluntarily incur any great danger, or use extraordinary diligence, or show unusual skill in preventing or suppressing an offence, or in arresting an offender, he shall be entitled to an honorary certificate made by the court, having the highest penal jurisdiction in the district of his residence, which certificate shall be entered on the minutes of the court, and published three times in three successive years, and authenticated copies shall be sent to the governor of the State, and to the president of the senate, to serve as recommendations for an appointment to any office in which the qualities he has shown may be useful.

"In cases of extraordinary exertion, coming within the intent of the last preceding article, which, in the opinion of the judge, and of the governor of the State, shall merit such distinction, a piece of plate of the value of one hundred dollars, with a suita-

ble inscription, to be executed under the direction of the governor, shall be added to the honorary certificate.

"Whoever shall give such information to a magistrate, as shall lead to the conviction of any one guilty of fighting a duel, or giving or accepting a challenge, or forgery, or any crime punishable by imprisonment for life, shall be entitled to receive, on the certificate of the judge and public prosecutor in the court where the conviction was had, the sum of fifty dollars, from the treasurer of the State, out of the moneys received for fines."

This provision, which may at first strike us as fanciful, if not calculated to encourage delation, is vindicated by Mr. Livingston, in the introductory report to this code, with great eloquence and much force of argument. He thinks that good policy as well as justice requires, that some external mark should be given of that esteem, which all feel for a citizen who has performed a meritorious action for the general good. That additional rewards will strengthen the motive to action, there can be no doubt; and, if they do not counteract the more refined and disinterested impulses which have the same tendency, they may be safely employed. The rewards held out for diligence, bravery, and skill, in preventing an offence or punishing an offender, are addressed solely to the love of that distinction which is founded on public gratitude; such rewards may be expected to raise the citizen in his own esteem, and give him at least a limited celebrity, which not only augments his own happiness, but, within a certain sphere, operates as an incentive to promote that of the public.

"Honors," Mr. Livingston observes, "conferred for brilliant achievements in war, or eminent services in council, may in a republic be said, perhaps with some propriety, to be liable to objection; not because they are wrong in themselves, but because, by exciting the admiration of the people to a high degree, and attaching it to one man, they give him an undue influence that may be sometimes used to the destruction of liberty. But no such consequence can be apprehended from the unpretending limited popularity and distinction given by the means pointed out by the code. On the contrary, beneficial political effects may be expected, by bringing within the reach of those in the humblest station, those testimonials of eminent merit, and by associating public favor in their minds with the execution of the laws. He who has risked his life in an unequal encounter with ruffians, either to protect another from their violence, or to secure them for the purpose of punishment, every

one will allow, deserves public esteem; but it can neither be permanent nor extensive, and, of course, will lose much of its value, if it is confined to the narrow circle of those who happen to have witnessed, or to have been benefited by its exertion. It is soon forgotten, it loses most of its effect as an example, and it is buried in the same oblivion with the every-day transactions which have nothing to impress them on the memory.

"Let the little hero of the hamlet have his celebrity for supporting the laws, and you will have fewer great heroes who seek it by breaking them; and let it be remembered, that the recorded certificate and the engraved goblet are not given to reward the act, but to keep it in memory. The only reward is the public consideration, which will not be measured by the worth of these testimonials, but by the merit and utility of the service rendered."

Stronger objections may be made to pecuniary rewards for denouncing the commission of certain crimes. Strong antipathies are universally attached to the name and office of an informer, even when the laws are neither oppressive nor unjust. If these antipathies originated in times and nations, where the injustice and oppressive nature of the laws forced upon the people the conviction that their execution was adverse to their happiness and interest, and those who exerted themselves in promoting it were the enemies, not the friends, of society; then it may follow, that the ministers employed in upholding the execution of just and mild laws, well understood by an intelligent community, will cease to be considered as engaged in a dishonorable duty; and the acceptance of a reward, sufficient merely to indemnify for loss of time, but not so great as to offer temptations for false accusation, will cease to attach any odium to its performance. If an officer, Mr. Livingston contends, receives a salary for the performance of his permanent functions, an individual ought, with equal propriety, to receive a compensation for his occasional service. In both cases there is a sacrifice of private convenience to produce a public good; in both cases it ought to be compensated. If public prejudice is against it, it may be replied, that the same prejudice formerly existed against the functions of the regular officer, but that it has gradually given way to the force of truth, and the progress of knowledge.

In framing the provisions, which authorize the interference of magistrates to prevent offences and to search for property illegally taken, the cases of interposition and the evidence necessary are pointed out with great precision; a circum-

stance peculiarly required, where something must be left to the discretion of the officer, and where opportunities may exist for much oppression, extortion, and fraud. Under the title of suppressing offences against personal liberty, are contained regulations for granting and enforcing the writ of *habeas corpus*, so complete as to give the fullest effect to that most simple and admirable of all contrivances for securing personal liberty. Strongly impressed with the utility of this great writ, Mr. Livingston seems desirous to increase every facility for procuring it, to enlarge the sphere of its relief, to give an adequate sanction to every provision respecting it, to impress upon the people the utility of preserving, and the danger of violating it, and to perfect, in every way, so invaluable a safeguard, bequeathed to us by the wisdom and patriotism of our fathers. In prescribing the highly interesting rules for military aid to the civil authority, such are adopted as may attain the end with the least violence. The militia are to be used, a force differing in nothing from that which is daily at the call of the civil officer, except in being organized and armed. It is of course only to be employed when the ordinary power has completely failed. Before it is brought up, a magistrate must display a white flag, and order the rioters to disperse. Unless to repel an attack endangering life, the order to disperse must be disobeyed for half an hour, before offensive arms are resorted to. When these become necessary, those only (such as the sword and bayonet), which may be directed solely against the assailants, are to be adopted; and the dangerous effect of fire-arms, which may injure the innocent as well as the guilty, is left to the last extremity.

Having prescribed the means of preventing inchoate offences, and arresting the course of such as are in operation, the second book of this code contains the mode of conducting prosecutions for those already consummated. Minute and careful regulations are laid down respecting arrest, detention, and bail, so as to make them clear to the most common understanding. In the whole course of procedure, there is no circumstance productive of so many vexatious, and even fatal effects, as that of arrests. Officers of justice, often extortionate and overbearing, pass the limits of just authority; accused men sometimes submit to this injustice, at others they resist where they should yield; and no inconsiderable proportion of violent infractions of the law constantly arises from an

ignorance of rights and duties in this respect, an ignorance inevitable where there is any obscurity or want of fulness and precision in regulating so important a branch of the conduct of every citizen.

The manner and effect of an examination of the accused by a magistrate, immediately after his arrest, have always been subjects of doubt and difficulty. On the one hand, it gives to the innocent the best opportunity of prompt explanation and self-defence; it obliges the guilty to give that account of his conduct which society has a right to demand from every one apparently infringing the laws. On the other, this explanation is not made before those who try the accused, and, of course, gives him little of its benefit; it may be attended with captious and insidious questions, which disguise, rather than elucidate the truth; and it may unjustly increase suspicion against the thoughtless or the timid. To secure these advantages, and to obviate these dangers, several provisions are introduced into the code. The prisoner, as soon as arrested, is to have counsel. Before his own examination, he is allowed to hear and read the evidence and depositions of the witnesses against him. The interrogatories which he is then required to answer, are prescribed by law, and point only to such simple circumstances as can be detailed with great simplicity of language. The answers are voluntary, though he is admonished that his refusal or falsehood will operate, as they ought, unfavorably to the belief of his innocence, when he comes to be tried; and he is to be permitted to correct and alter, before he signs them, the answers which the magistrate takes from his lips.

Among the provisions that direct the mode of proceeding on the trial, is one giving the closing argument to the defendant. This was thought proper and just, because it is an advantage, which, from necessity, one party may and the other cannot enjoy. There are disadvantages inseparable from the position of the accused, and to deprive him of what may, in some degree, counterbalance them, is thought by Mr. Livingston to be contrary to justice and humanity. The same may be said of a similar change which forbids a judge in his charge to recapitulate the testimony, unless expressly requested to do so by the jury, and obliges him to confine his statements exclusively to such matters of law, as he shall think necessary for their information in giving their verdict.

The code concludes with a third book, containing forms for all the proceedings directed or authorized by its preceding parts. In framing them, which has been evidently done with much care, Mr. Livingston's object appears to have been to unite brevity with so much certainty and precision, as will secure the party from any possibility of mistaking the precise fact of which he is accused. To attain this end is certainly to close the door against one of the greatest evils of criminal jurisprudence.

III. The *Code of Evidence* begins, as do those that precede it, by an introductory title, laying down rules and making explanations, to avoid circumlocution, and to give the perspicuity necessary to a full understanding of the subsequent provisions. Among these are two articles, intended to secure the advantages to be derived from the wisdom of the judges in the suggestion of defects proved by experience, without incurring the fault, into which the same intention has repeatedly led, of transferring to the judiciary, powers exclusively legislative. The first of these articles directs the court to make a report to the legislature, whenever any provision of the code, for the admission or exclusion of evidence, is found to operate improperly, either to the prejudice of the accused or to the ends of public justice. By these means, instead of judicial decisions, of doubtful authority, interspersed through voluminous reports, a positive law, briefly expressed, may be introduced regularly into the code by the legislative power. The other article provides a similar remedy for omissions, instead of leaving them to be supplied by the discretion of the courts. These provisions, novel in themselves, establish principles highly important to be introduced into every written code; they counteract the most forcible objection that can be made to the system, without calling in the inappropriate exercise of legislative discretion by the judiciary; they offer the greatest facility for discovering imperfections, and bringing them to the notice of the legislature; and they check at once the injurious operation of any rule discovered by experience to be bad.

The two books into which this code is divided embrace, first, the nature and kinds of evidence; secondly, the rules to be applied, when the different kinds are offered in proof.

In the first book, evidence is defined to be that which brings, or contributes to bring, the mind to a just conviction

of the truth or falsehood of the fact asserted or denied. When applied to the determination of litigated rights, it is necessarily restricted to what is declared by the written law sufficient to produce that just conviction, in a greater or less degree. This necessarily divides evidence into two great classes; that which the power called on to judge has from its own knowledge, and that which it derives from extrinsic sources. The first class has no subdivision. The second is of course of various degrees, whether considered in regard to its source or its weight. Its source may be personal communication, written instruments, or natural objects, making it testimonial, scriptory, or substantive. Its weight ascends from mere induction to complete proof, and is presumptive, direct, or conclusive.

In prescribing the rules applicable to these several kinds of evidence, which is the object of the second book of the code, that embraced in the first subdivision, as derived from the knowledge of the judge himself, is properly confined within very narrow limits. He can never act merely on his own knowledge of a fact, except where expressly authorized to do so. Instances of this authority are found in his power to pronounce on the authenticity of a record, to commit for an offence in his presence, to remove for a disturbance in court, and to employ the military in aid of the civil power. But where he knows a material fact not thus designated, he must be examined as any other witness; and, if a juror is similarly situated, his testimony must be given to his fellows in the same judicial manner.

In establishing the rules of extraneous evidence, Mr. Livingston has introduced some new principles in regard to such as is testimonial, or derived from personal communication.

"The whole machinery of jurisprudence," he remarks, "in all its branches, is contrived for the purpose of enabling the judging power to determine on the truth or falsehood of every litigated proposition. This is to be done by hearing and examining evidence; that is to say, hearing and examining every thing that will contribute to bring the mind to the determination required. If we refuse to hear what will, in any degree, produce this effect, we must determine on imperfect evidence; and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather than a just determination. But, as in morals we are for-

bidden to do evil that good may come of it, so in legislation, we should refrain from doing that kind of good which may produce more than its equivalent in evil. The desirable end to be attained by the admission of every species of evidence, may be more than counterbalanced, in some instances, by the evil attending it; sometimes, in the shape of inconvenience and expense inseparable from its procurement; sometimes, from the danger of error arising from the deceptive nature of the evidence itself. The great art is to weigh these difficulties, and in those cases where they are most likely to preponderate, but in no others, to exclude the evidence."

The circumstances which are generally understood to cause exclusion, are interest, connexion in marriage, infamy, the relation of an attorney to his client, that of a Catholic to his confessor, and disbelief in a future state of rewards and punishments. In the remarks on the code of procedure, the extent to which a criminal may be allowed to testify in his own case, has been noticed; the basis of his admission and exclusion being simply the consideration of what is most likely to be effective in establishing his innocence or guilt. This consideration is applied in this code to the evidence of one, who, although not a party, may have an interest in the result of the judicial proceeding, — an eventual gain or loss that may be estimated by money; and it has led to the abolition of such disqualification, although the fact of interest in the witness is to be fully made known, that it may lessen according to its degree the credit to be given him. To exclude entirely an interested witness involves the double assumption, that his interest will outweigh his conscience and fears of detection and punishment, and that the judge or jury will believe the falsehood he asserts, although his interest is known. These assumptions are founded neither in probability nor reason, and, on that account alone, would authorize the rejection of the antiquated rule. But, even if they were well founded, it would be certainly unwise, merely on account of them, to exclude the testimony of interested witnesses from whom the truth may fairly be expected. The only sound rule is the obvious one. The judges of the facts are the true judges of the credit of the witness; they know his interest and his bias; let them hear him; let them say whether his interest is such as to destroy his credit; let them form, with full knowledge of the particular case, that opinion which the positive rule of

exclusion obliges legislators to form in advance, and entirely without such knowledge.

If the search for truth does not require that an interested person, nor even a party himself, should be excluded from giving testimony, neither does it make connexion in marriage a cause for rejecting a witness. If it be admitted, as it will be that every one has a right to all the information necessary to the discovery of truth, unless deprived of it for reasons of great public or private convenience, then it must be proved that such inconvenience arises from a husband or wife being examined in regard to each other. To establish this is manifestly impossible. To say that there is danger of domestic dissension or of perjury is to give a reason not more strong, than might be offered for the exclusion of vast numbers of witnesses; while, on the other hand, such testimony often is undoubtedly the best which an accused person can offer in his own behalf. The feelings produced by such a tie are known to those to whom the evidence is submitted; they will be weighed in the credit which it receives; to say they are sufficient to close peremptorily such an avenue for truth, is indeed strangely to distrust the intelligence and honesty of the judge.

Mr. Livingston considers that in the relations of attorney and client, and Catholic and confessor, there are reasons sufficient to justify the exclusion of their testimony in regard to facts communicated or discovered by means of those relations. The circumstances, under which the knowledge is obtained, would make the disclosure an invasion of the rights of personal liberty and conscience. The law besides would be useless, if it could be executed; because, in that case, as it would destroy both confidence and confession, nothing would be disclosed.

Exclusion on the ground of infamy is not admitted in the code. Such a disqualification is less reasonable than that of interest. There, a motive may exist for stating a falsehood in preference to a truth. Here, there is no such motive. The only reason is the depravity of the witness. This may affect his credit; but to deprive a person accused of the entire benefit of his testimony, when sufficient or necessary for an acquittal; to permit a heinous offence to pass unpunished, when the facts are known only to him; are perversions of

every principle that ought to regulate the admission of evidence.

The doctrine which makes a witness's belief in a future state of rewards and punishments a condition of his competency, Mr. Livingston considers as improperly making the fidelity of statement to depend solely on religious belief. While he owns that such a belief is an additional motive and guaranty for the truth of a witness, he maintains that there are reproaches of conscience in this life ; a moral sense, disclosing the utility and beauty of truth ; sentiments of manly honor ; a disdain of falsehood ; a dread of society ; a fear of punishment, which are also motives and strong motives ; and that, although they might and undoubtedly would be strengthened by the impressions of religion, they are yet in themselves sufficient to justify us in believing, that they alone would induce a witness to prefer truth to falsehood. The want of that additional inducement might lessen the credit of a witness, among the pious and the good, but he conceives that it would not of itself, among the thinking or the charitable, produce a total disbelief of all he might declare.

Allowing, therefore, no exceptions to the admission of testimonial evidence, except the two we have mentioned, together with insanity and immature infancy, the code proceeds to regulate the manner in which it is to be received. Here a boundless field of debatable ground is presented by a provision, that, with the exception of such as suggest facts to the witness, all interrogatories pertinent to the case, may be put and must be answered ; and a short section declares, that in written examinations the rules for receiving oral declarations shall be followed.

Scriptory evidence, which includes all kinds of written proof, except the examination of witnesses reduced to writing, is of two kinds ; authenticated and unauthenticated. The former consists of public instruments duly attested in a prescribed form, such as legislative acts, those of public officers in executing their official duties, and records of courts or of government. The latter consists of private instruments, either attested by the signature of the party whose act it purports to be, or not attested, from accident or from its natural character.

Substantive evidence is so simple and limited in its nature, that it is only necessary to prescribe such rules as require

additional proof to show its application to the principal case. Thus a bloody dagger is substantive and striking evidence; but it fails of its weight, unless it be proved that it was in the hand of the accused, before or after the time a homicide was perpetrated.

From considering evidence in relation to its source, the code proceeds to ascertain the degree of weight it is entitled to, when presumptive, direct, or conclusive. It may be objected, that, the conviction of truth being an intellectual operation, the degree to which evidence is to operate cannot be prescribed; and that this division, however convenient in developing the nature and theory of evidence, is not necessary in fixing rules for its admission. It must be allowed, however, that uniformity in judicial decisions is a highly desirable object, and that, in similar circumstances, the same deductions ought to be made from the same facts. This can only be done by requiring the judicial decree to be rendered in conformity with the established rule, whenever the evidence considered by it to be sufficient is produced. To establish that rule by positive legal provisions is, therefore, infinitely better, than leaving it to usage or precedent.

Presumptive evidence may result from circumstances proved, by the mere operation of the mind, or be drawn from them by express direction of law. Its effect, whether simple or legal, is to establish a proposition, until the contrary is directly shown, or it is rendered doubtful by other presumptions. The circumstances from which it arises must be proved by legal testimony, and the deductions must be such as are warranted by the usual propensities of mankind, the habits or passions of the individual, or the ordinary course of business and human events.

Direct evidence, if true, indisputably establishes a proposition. The declaration of a witness that he saw the act in controversy done, is direct evidence; for, if the declaration be true, nothing more is necessary to establish the commission of the criminal act; no deduction need be made from the fact that is proved, as in the case of presumptive evidence.

Conclusive evidence proceeds a step farther. It is that which the law declares to be absolutely sufficient, without requiring the judge to draw any inference from the fact, and the reality of the fact alleged is undoubted. The confession of the accused is not admitted to be conclusive, because its

truth is not of necessity undoubted; insanity, promises, fear, hope of liberty or pardon, may produce a confession contrary to fact; and, therefore, although it is direct evidence, it becomes not conclusive till its truth is absolutely established. Proof that an absentee was born one hundred years before, is only presumptive evidence of his death, because, though it be the general course of nature for men to die before that age, yet it is not invariable; but proof that he was born two hundred years ago is conclusive evidence, because no instance has been known of human life extended beyond that period.

IV. The *Code of Reform and Prison Discipline* contains those provisions without which the peculiar benefits anticipated from the whole system must be lost. Superseding, as we have seen it does, the use of penalties on which reliance has heretofore been placed, its whole efficacy must depend on the manner in which confinement is made to answer the ends of punishment. The place of confinement, therefore, its arrangements and interior regulation, and the treatment and discipline to which prisoners are to be subjected, when confined within it, form the natural divisions of this code.

The first book accordingly treats of places of confinement, their construction and officers. These places naturally divide themselves into the two great classes, appropriated for the reception of persons charged with offences, and the punishment of convicted offenders. The former is called a House of Detention; the latter a Penitentiary, or School of Reform, according to the age of the convict and the character of his crime.

The House of Detention is to be so constructed, as to keep in four divisions, each division entirely separate from the others, the prisoners comprehended in the following classes. First, male persons detained as witnesses; those confined for misdemeanors, disturbance of a court, breach of recognizance and non-payment of a fine; and those sentenced to simple imprisonment. Second, female prisoners of the same descriptions. Third, male persons regularly committed on an accusation of crime. Fourth, female prisoners of the same description. The confinement of those persons in the first and second classes who have been sentenced to imprisonment, and of every one embraced in the third and fourth classes is to be solitary; but there are to be two enclosed yards, the one for the male, the other for the female prisoners, where

they may take exercise and pursue such employment as is permitted.

The Penitentiary and School of Reform are for the confinement of all those convicted of crime ; the former containing such convicts as have attained the age of eighteen at the time of conviction ; the latter such as are under that age, to whom may be added other youthful offenders and vagrants specially included by law. The Penitentiary is to contain a cell with an enclosed court for every convict, a machine so disposed that a convenient number of prisoners may work at it separated from each other by a wall, school-rooms, an infirmary, and all buildings necessary for safely keeping and preserving the health of the prisoners. The House of Detention has separate divisions for the sexes, a separate dormitory for each prisoner, courts and rooms for their employment, school-rooms, and an infirmary.

The officers of these places are not only the wardens and keepers necessarily employed, but there are also chaplains, teachers, matrons, and physicians, whose duties, strictly specified by the code, embrace the religious instruction and the constant education of those detained, the preservation of their health, and the enforcement of continual industry. To see that these duties are adequately performed, a board of five inspectors is appointed by the highest authority of the State, who, together with the governor, the presidents of both houses of the legislature, the judges of the supreme court, and other distinguished functionaries, are directed constantly to visit the different places of confinement, to prevent all oppression, peculation, and abuse, in the management of them, and to make frequent periodical reports to the legislature. Their duties in all these respects are strictly prescribed by the code; they are allowed an adequate compensation ; and their feelings, character, and honor are thus enlisted in the strict maintenance of the institution, on the plan framed by the authority from whom they receive their trust.

The second book of this code contains the provisions for the treatment of prisoners in the several places of confinement. It has been already seen from the plan of their construction, as well as from the penalties prescribed by the code of crimes and punishments, that a proper classification and separation in a few cases, and entire solitude in nearly all, are laid down as the fundamental principles of reform and prison discipline.

Nothing perhaps is more universally admitted than the danger of vicious association; yet in no respect has the discipline of prisons been more defective, than in confounding together all who are involved in the various, different stages of criminal procedure. After condemnation, there can be no association but of the guilty with the guilty; in preliminary imprisonment, guilt must be associated with innocence. He who is confined as a witness, for a misdemeanor, or on suspicion, leaves the den, where he was imprisoned, with tainted morals, depraved habits, and excited passions, which are certain to lead him back to the abode of infamy, where they were first acquired or infinitely augmented. The provisions of the code, applicable to this subject, are the more important, because, while there has been much legislation on the subject of solitary imprisonment, as a punishment after conviction, few efficient steps have anywhere been taken to prevent the demoralizing consequences attending indiscriminate association before trial, and for offences which amount not to crime.

Persons whose liberty, for the good of society, must be restrained, are either those upon whom imprisonment is imposed merely to secure their appearance when the purposes of justice require it, or those upon whom it is inflicted as a punishment. The detention of those of the first description, to be just, must be accompanied with no unnecessary privation; it is therefore provided, that they shall be in all respects comfortably attended to, allowed the visits of their families and friends, supplied with books, and receive the proceeds of such labor as they may choose to engage in. Persons who are accused of offences, punishable when proved by a comparatively light penalty, ought not to be treated with that rigor of confinement which is necessary to secure those charged with crime. The degrees of this rigor, are therefore distinctly laid down in the code; the danger of guilty associations is prevented; those comparatively innocent are separated from such as are probably guilty; those accused of offences implying no great moral turpitude, from the depraved in mind and manners; the young from the old offender. Classification and separation are provided for before trial, with the same care as after conviction.

The rules which regulate the imprisonment of the convict, when it comes to be treated in a double capacity, as a punishment and means of reform, are made to refer to the various

degrees of simple imprisonment, imprisonment at hard labor, and solitary confinement at certain intervals ; which were the penalties designated in the Code of Crimes and Punishments. Precise provisions are prescribed, to prevent oppression on the one hand, and on the other strictly to enforce the execution of the sentence ; nothing is left to the discretion of turnkeys or keepers, to be varied according to their caprice or the means a criminal may have of purchasing their favor; the qualifications required of these officers are pointed out, as a guide to the selecting power, and a lesson to him who is chosen, so that the one may not commit the fatal error of underrating the talents necessary for the employment, and the other may feel its dignity and responsibility; the punishment, once ordered, can neither be aggravated nor alleviated by a ministerial officer. When labor is added to confinement, the convict is made to rise at the dawn of day and to continue at work until half an hour before sunset, except during the intervals of meals and attendance on a teacher ; perseverance, accompanied with obedience, moral conduct, and a desire to reform, bring to the prisoner proportionate and increasing advantages of a better diet, permission to read books of instruction, the privilege of visits from relations and friends, and ultimately a part of the proceeds of his industry. Solitary confinement, without labor and in entire seclusion, varies as to duration according to the enormity of the crime ; those convicted of murder, without any aggravating circumstances, are deprived of labor for two consecutive months every year, while, in the case of the infanticide and the assassin, this is extended to three and to six months ; none of them have any communication with persons out of the prison, except the inspectors, and they are considered dead to the rest of the world.

It seems to be equally consistent with humanity and sound reason, that the severity of these punishments should be tempered, or at least the mode of applying them should be varied, in the instance of a youthful criminal. When a child of tender age commits an offence, he probably acts under the influence of those passions which nature has given him, while she has not yet conferred that discretion which teaches him to control them. He is, perhaps, without parental or friendly advisers, and knows neither the duties nor penalties of the law. In such a case, if crime has been committed, it is but just to

seek to remove its cause, by the milder method of instruction and useful employment. Instead, therefore, of being consigned to a penitentiary, the criminal under eighteen is sentenced to the School of Reform, the details for the government of which are minutely laid down. Occasional solitude, constant instruction, labor in the different mechanic arts, with mild but certain punishment for the bad, and marks of distinction for those who improve, form the outlines of this excellent branch of prison discipline; and contribute all that can be devised, to rescue the young from a headlong course leading them to ruin and aggravated crime.

To these two books, which, properly speaking, embrace all the branches of a code of reform and prison discipline, Mr. Livingston has added a third, for the purpose of establishing an institution connected with it in its general features, and certainly of great importance in a complete system of police. This he denominates a House of Refuge and Industry. Its object is not the punishment of crime; it is intended to afford the means of employment, voluntary for those able and willing to labor, and coercive on those who, although able, prefer a life of idleness, mendicity, or vice. Implements and necessary materials are provided for the poor, habits of economy and industry are taught, good but plain food is supplied, the vicious not yet convicted of crime are reclaimed, and the unfortunate are protected and relieved. To one unhappy class, who are expressly entitled to admission, that of discharged convicts, such a refuge is invaluable.

"Here," in the language of Mr. Livingston, "he may find employment and subsistence, and receive such wages as will enable him to remove from the scenes of his past crimes, place him above temptation, confirm him in his newly acquired habits of industry, and cause him safely to pass the dangerous and trying period between the acquisition of his liberty and restoration to the confidence of society. The cause, the temptation, or the excuse for relapse, being thus removed, it is hoped that instances of return to vicious pursuits will become more rare, and that many will become useful members of society, who, under the present system, either burden it by their poverty, or prey upon it by their crimes. The House of Refuge is rendered the more necessary, because a man of prudence will no more receive or employ a convict discharged from one of our present penitentiaries, than he would shut up with his flock a wild beast escaped from its keepers; but, the reformatory plan once fairly in operation, its principles studied, developed, steadily adhered to, im-

proved by the light of experience, and its beneficial effects upon morals perceived, the man who has undergone its purifying operation will, in time, be no longer regarded with fear or contempt, and society, by confiding in his reformation, will permit him to be honest."

V. There only remains what may be considered rather as an appendix, than a portion of the System of Penal Law, the *Book of Definitions.* This is added, in order to render the system both explicit and concise. The employment of technical terms, though never used where common expressions sufficiently definite are to be found, is in many instances unavoidable. In all such cases, and whenever words or phrases are either ambiguous or employed in any other sense, than that given them in common parlance, they are defined and explained in this supplementary book.

These remarks complete the analysis of the System of Penal Law, prepared by Mr. Livingston for the State of Louisiana. It has been less the object of them to offer a criticism upon its various provisions, than to condense and present them in a complete and single point of view. It would have been a task comparatively easy to examine particular portions more in detail; some of the views, which we have passed hastily over, might, perhaps, have been partially controverted, others were susceptible of far more illustration and praise than has been bestowed. But the work is one every way worthy of the deep consideration of all communities, not partially but as a whole; not merely for the provisions it establishes in regard to one offence or another, but for the wise, the liberal, the charitable manner in which it travels over and embraces those rights and duties, the most sacred, that belong to and devolve upon each member of the human family. Taken as a single and complete work, it is the production of a mind at once prepared, by long practice in the study and profession of the law, to treat it with all the lights and aids of science, and imbued with that humane and comprehensive spirit, which is necessary to reform what is rooted in general habit and prejudice, and to systematize and reduce what has been diffused by circumstances and time. It has already fixed upon Mr. Livingston the attention of the most intelligent statesmen and purest philanthropists in other countries, and enrolled his name in those high places which are assigned to general benefactors of mankind.